10 (5) July 25, 07

No. 06-11206

IN THE

Supreme Court of the United States

DEONDERY CHAMBERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY BRIEF

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The government's Brief in Opposition never engages the substantial grounds for granting certiorari in this case. The government tries to avoid the question presented entirely by ignoring the record in this case and the undisputed application of this Court's decisions in *Taylor* v. *United States*, 495 U.S. 575 (1990), and *United States* v. *Shepard*, 544 U.S. 13 (2005). Contrary to the government's argument, Opp. 4-5, this case is not about whether a non-specific crime of "escape" is a "violent felony" under the Armed Career Criminal Act, 18 U.S.C. § 924(e) ("ACCA"). The underlying offense at issue was properly understood by the Seventh Circuit as a mere failure to report for confinement. The question is whether such a failure to report for confinement is a "violent felony" under the ACCA.

The government pretends there is no split of authority on that question, but only by baselessly trying to confine the

Ninth Circuit's decision in *United States* v. *Piccolo*, 441 F.3d 1084 (9th Cir. 2006), to the career offender provision of the Sentencing Guidelines. In attempting to so confine *Piccolo*, the government ignores both the language of the ACCA, which even the government acknowledges is "identical" to the career offender Guideline, Opp. 6 n.2, and the numerous courts of appeals that have held that the career offender Guideline and the ACCA should be interpreted to mean the same thing. Even more importantly, the split of authority implicated in this case has deepened since the petition was filed, with the Sixth Circuit holding that a failure-to-report escape under Michigan law is not a violent felony under the ACCA. *United States* v. *Collier*, No. 06-1395, 2007 U.S. App. LEXIS 16598, at *7-15 (6th Cir. July 12, 2007).

Finally, the government inexplicably argues that this Court's recent decision in *James* v. *United States*, 127 S. Ct. 1586 (2007), does not support certiorari because it "presents a different question" from that presented here. Opp. 8. But that is precisely the point. As detailed in the petition, *James* left open what both the majority and dissenting opinions recognized as an important question under the ACCA: what is the standard for determining when a crime that is not analogous to those enumerated in the ACCA qualifies as a "violent felony." This Court in *James* chose not to answer that question because the crime in that case was analogous to an enumerated crime. This admittedly different case presents that important question, which this Court should resolve here.

1. The government admits that there is no doubt that petitioner's underlying conviction for "escape" under Illinois law was for "failure to return from furlough or work release." Opp. 3. Because the basis of petitioner's conviction for "escape" was not in doubt—it was undisputed that the Illinois charging document had made clear that petitioner's escape charge was based on his failure to report for incarceration, Pet. App. 22a—petitioner does not ask whether the generic crime of "escape" is a "violent felony" under the ACCA.

Petitioner asks instead whether the more specific kind of "escape" that he had committed—failing to report to a penal institution—is a violent felony. *Id.* at 3a.

The government refuses even to acknowledge that this case presents the question whether a failure-to-report escape is a violent felony under the ACCA. Instead, the government asserts that under *Taylor* this Court should refuse to acknowledge that petitioner's "escape" was a failure-to-report, and not a custodial escape. The only reason the government gives for this sleight of hand around the actual question presented by the petition is that *Taylor* held that the question "whether an offense creates a serious risk of injury to another does not depend on the particular facts underlying a conviction, but rather on the statutory definition of the offense." Opp. 5. What the government has not acknowledged, however, is that, under both *Taylor* and *Shepard*, to define the "offense," a court should look not only to the statute, but also to, among other things, "the charging document." *Shepard*, 544 U.S. at 16; see also *Taylor*, 495 U.S. at 600-02. The government has simply mischaracterized the "categorical" rule of *Taylor* as if it required looking only to the statute of conviction, with the result that it treats petitioner's offense as if it were in a more generic category (escape, undifferentiated) than this Court's decisions place it (failure-to-report escape).[1]

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[1] Even if a court were supposed to confine itself to the text of the statute under which the defendant is convicted, which is *not* the rule of *Taylor* and *Shepard*, petitioner's offense would still properly be defined not as generic escape, but more narrowly as non-custodial escape. The offense of conviction at issue here is 720 ILCS 5/31-6(a), which reads as follows:

> A person convicted of a felony or charged with the commission of a felony who intentionally escapes from any penal institution or from the custody of an employee of that institution commits a Class 2 felony; however, a person convicted of a felony who knowingly fails to report to a penal institution or to report for periodic imprisonment at any time or knowingly fails to return from furlough or from work

Not only are *Taylor* and *Shepard* clear on this point, but the Seventh Circuit, in the decision under review, said that it would be appropriate to "divid[e] escapes, for purposes of 'crime of violence' classification, into jail or prison breaks on the one hand and walkaways, failures to report, and failures to return, on the other." Pet. App. 3a. Though apparently of a contrary view, the government fails even to cite this passage of Judge Posner's decision, much less explain why it is wrong. In fact, Judge Posner is correct, as both *Taylor* and *Shepard* make clear. The offense for purposes of the violent felony inquiry under the ACCA here is a failure-to-report escape.

2. The government also ignores substantial authority in its effort to make the split of authority in this case disappear. The government acknowledges that the Ninth Circuit in *Piccolo* held that a non-custodial walkaway escape from a halfway house is not a crime of violence under the career offender Guideline. Opp. 7. While admitting that the reasoning in *Piccolo* appears equally applicable to the ACCA, the government nonetheless suggests that the absence of a Ninth Circuit decision strictly so holding means there is no present split of authority. *Id.* But, as petitioner pointed out, Pet. 9 n.2, the uniform view of lower courts is that the interpretation of the career offender Guideline is applicable to the ACCA violent felony provision, and vice-versa. *United States* v. *Winn*, 364 F.3d 7, 9 n.1 (1st Cir. 2004); *United States* v. *Mathias*, 482 F.3d 743, 747 n.2 (4th Cir. 2007), *petition for cert. filed*, No. 07-61 (U.S., July 12, 2007); *Collier*, 2007 U.S. App. LEXIS 16598, at *4 n.3; *United States* v. *Savage*, No. 06-30451, 2007 U.S. App. LEXIS 13713, at *12 (9th Cir.

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and day release or who knowingly fails to abide by the terms of home confinement is guilty of a Class 3 felony.

This statute expressly distinguishes between custodial escape, which is a Class 2 felony, and non-custodial escape, including failure to report or return from furlough or work release, which is a Class 3 felony. It is undisputed that petitioner's underlying offense was in the latter category.

June 12, 2007); *United States* v. *Shipp*, No. 06-5056, 2007 U.S. App. LEXIS 11760, at *11 (10th Cir. May 17, 2007); *United States* v. *Taylor*, No. 06-13139, 2007 U.S. App. LEXIS 13822, at *3-4 (11th Cir. June 13, 2007).

Furthermore, the government offers no explanation for why the two provisions should have any different meaning. To the contrary, the government expressly recognizes the "identical language" of the career offender Guideline and the ACCA. Opp. 6 n.2. The government is unable to produce a principle of law or sound policy that would counsel in favor of treating the two provisions differently. There is none. *Piccolo*, then, creates a live split of authority warranting this Court's review.

Significantly, the split has also deepened since the petition was filed. On July 12, 2007, the Sixth Circuit distinguished its prior decisions in *United States* v. *Harris*, 165 F.3d 1062 (6th Cir. 1999), and *United States* v. *Anglin*, 169 F. App'x 971 (6th Cir. 2006), *cert. denied*, 127 S. Ct. 1249 (2007), and concluded that a failure-to-report escape under Michigan law is not a violent felony under the ACCA. *Collier*, 2007 U.S. App. LEXIS 16598, at *6-15. The Sixth Circuit expressly noted the split of authority on the question, *id.* at *8, and concluded that the only rationale that has ever been offered for treating failure-to-report escapes as violent felonies under the ACCA—that violence may ensue upon subsequent capture—does not apply to failure-to-report escapes in Michigan. *Id.* at *11-15. As the Sixth Circuit observed, Collier's

> "escape" was simply stepping off a public Greyhound bus—where he was unaccompanied by any correctional officials—and failing to report to the facility to which he was being transferred. We doubt that a statute covering this "failure to report" variety of escape necessarily "involves conduct that presents a serious potential risk of physical injury to another."

Id. at *8 (quoting 18 U.S.C. § 924 (e)(2)(B)).

The D.C. Circuit had explained in *United States* v. *Thomas*, 333 F.3d 280, 282-83 (D.C. Cir. 2003), why the risk of violence upon subsequent capture "proves too much," *Collier*, 2007 U.S. App. LEXIS, at *9, and would logically entail treating all crimes as crimes of violence.[2] *Collier* and *Thomas* and *Piccolo*, 441 F.3d at 1089, and Judge Posner's discussion below, Pet. App. 2a, all reflect the common-sense reaction that a *failure* to come into contact with law enforcement officials by *failing* to report for confinement does not create a "serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii).[3] Justice Scalia's dissent in

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[2] The D.C. Circuit has since held that a non-custodial escape is a violent felony. *United States* v. *Adewani*, 467 F.3d 1340, 1342 (D.C. Cir. 2006). It is noteworthy, however, that in so holding, the D.C. Circuit did not confront the persuasive *dicta* in *Thomas* that argued against treating non-custodial escapes as violent felonies. Instead, the D.C. Circuit first reconsidered the issue in a case, coincidentally also captioned *United States* v. *Thomas*, where the factual record and the statute of conviction left the court uncertain whether the underlying escape conviction was custodial or not. *United States* v. *Thomas*, 361 F.3d 653, 658-60 (D.C. Cir. 2004) (defendants merely "hypothesize" that their underlying escape crimes were non-custodial, but point to no charging document or other properly considered evidence to support the hypothesis), *vacated*, 543 U.S. 1111 (2005). *Adewani* subsequently applied the result in the second *Thomas* decision, without any further explanation, under circumstances where it may have been clear that the defendant's underlying crime was a non-custodial walkaway offense. 467 F.3d at 1342 (noting Adewani's "conten[tion]" that his convictions were for "walking away from halfway houses" and never questioning his contention).

[3] The result in *Collier* did not rest "solely" on the distinction between custodial and non-custodial escapes. *Collier*, 2007 U.S. App. LEXIS 16598, at *11. The Sixth Circuit also determined that a failure-to-report escape under Michigan law is not a violent felony because Michigan does not treat "escape" as a continuing offense. *Id.* at *11-15. Whether a state chooses to define "escape" as a continuing offense or not does not change the fact that the potential for violence from a failure-to-report escape arises *only* from the attempt to capture the offender, not from any conduct that the offender must undertake to commit the offense. In any event, *Collier*'s additional reason for treating failure-to-report escapes under

James specifically noted that treating walkaway escapes as violent felonies suggests that "virtually any crime could qualify." 127 S. Ct. at 1606 n.4 (Scalia, J., dissenting). And petitioner argued that this case presents this Court with an opportunity to place some principled limit on this rationale so that the ACCA does not expand far beyond its intended scope. Pet. 15-18. The government, which merely parrots the view that the risk of subsequent capture supports treating all categories of escape as violent felonies, Opp. 5-6, offers no substantive response.

3. Finally, the government simply never disputes, or even discusses, the fact that both the majority and dissenting opinions in *James* expressed the view that the standard for determining when an unenumerated offense that is not analogous to any enumerated offense under the ACCA is a violent felony remains an unresolved and important question of law. Pet. 13-15. The government likewise never disputes that the crime at issue here—a failure-to-report escape—would provide this Court with an opportunity to provide some much needed guidance on that issue.[4]

* * * *

In sum, the Opposition fails to undermine any of the compelling reasons to grant certiorari here. This case presents a split of authority on a recurring issue of federal law that the opinions in *James* stated would benefit from

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Michigan law differently from other escapes only furthers the difference of opinion in the lower courts, underscoring the need for this Court's review.

[4] The government argues that this Court's previous denial of certiorari in two cases where the certiorari papers were filed prior to *James* supports denial of certiorari here. Opp. 9; *see Adams* v. *United States*, 127 S. Ct. 2095 (2007); *Ballard* v. *United States*, 127 S. Ct. 2094 (2007). But the fact that those petitions could not have briefed the import of this Court's decision in *James* shows that those prior denials are of no significance here. Unlike here, the Court in those cases did not have the benefit of the parties' presentation of the issues raised by *James*.

consideration by this Court. The expansive view of the ACCA that underlies petitioner's enhanced sentence requires some limiting principle that only this Court can provide.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully Submitted,

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I, Robert N. Hochman, do hereby certify that, on this twenty-fifth day of July, 2007, I caused one copy of the Petitioner's Reply Brief in the foregoing case to be served by an overnight delivery service on the following party:

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